

Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Lynn Young, Clerk

Thursday, August 7, 2008, 1:30 p.m.

**JAMES GABRIEL JENKINS and
TERRI JANG-HEFNER**

v.

**DEBRA BOWEN, in her official capacity
as Secretary of State**

**GEOFF BRANDT, in his official capacity
as State Printer; RON PRENTICE,
ROSEMARIE "ROSIE" AVILA,
BISHOP GEORGE MCKINNEY, DR.
JANE ANDERSON, M.D., ROBERT
BOLLINGBROKE, AND JERALEE
SMITH, as real parties in interest**

Case Number: 34-2008-00017366

Proceedings: Petition for Writ of Mandate

**Filed By: Karen Getman, Remcho, Johansen & Purcell, LLP, Attorneys for
 Petitioners**

ORDER AFTER HEARING

This case is related to Case No. 34-3008-00017351. The background facts are the same in both cases and are described in the Court's ruling in the related case. In the interests of judicial economy, the Court shall not repeat them here.

Request for Judicial Notice

Petitioner's request for judicial notice is granted, except as to Exhibit E.
(*Kauffman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26.)

Discussion

The petitioner in the related case challenges several ballot arguments *against* Proposition 8. In this proceeding, petitioners James G. Jenkins and Terri Jang-Hefner ("Petitioners") challenge several ballot arguments *for* Proposition 8

As set forth in the ruling in the related case, Elections Code § 9092 provides that any elector may seek a writ of mandate requiring any copy to be amended or deleted from the ballot pamphlet, but a writ of mandate shall issue only upon "clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of [the code]." (Cal. Elec. Code § 9092.) In making this determination, courts must be mindful that the ballot argument portion of the ballot pamphlet is a limited public forum implicating the right of free speech. Thus, in reviewing ballot arguments, courts must distinguish false or misleading assertions of fact from "the typical hyperbole and opinionated comments" that are – regrettably – "common to political debate." (*San Francisco Forth-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 649-650.)

Even when confronted with assertions of fact, courts must exercise appropriate caution so as not to substitute the judgment of the court for the judgment of the electorate. (*Id.*) When factual assertions are reasonably subject to dispute, courts ordinarily should not interfere with the political process. (*Id.*) Only when factual assertions are shown to be conclusively and objectively false or misleading should a writ issue. (*Id.*)

In this case, Petitioners contend that several of the ballot arguments in favor of Proposition 8 are false and misleading.

First, Petitioners challenge the statement made both in the Argument in Favor of Proposition 8 and in the Rebuttal to Argument Against Proposition 8 that even without marriage, gay and lesbian domestic partners have "the same rights, protections and benefits" as married spouses, and that Proposition 8 would not take away any of those rights. Petitioners contend these statements are objectively false and misleading and must be deleted. The Court does not agree.

The suggestion that domestic partners have the same rights, protections and benefits, although technically imprecise, is "hyperbole," and is not objectively and prejudicially false or misleading.

As the California Supreme Court made clear in *In re Marriage Cases* (2008) 43 Cal.4th 757, the California domestic partnership statutes generally grant same-sex couples all of the legal benefits, rights and responsibilities accorded to married couples. (*Id.* at pp.780, 801, 805 fn.24, 806, 807, 830-831.) It may be more accurate to say that domestic partners have "virtually" all of the substantive benefits and rights afforded by California law to married couples, but it is not materially false and misleading to assert that the substantive rights and benefits are the same.

In contrast, the proponents' argument that Proposition 8 does not take away "any rights" from same-sex couples is false and misleading. The California Supreme Court held that same-sex couples have a constitutional right to marry under the California Constitution. (*See Marriage Cases, supra*, at p.783, 812, 820, 825, 829 fn.52.) Proposition 8 would take away that right. Thus, this portion of the ballot argument is misleading.

However, the argument can be amended so that it is not false or misleading. Because Proposition 8 would not take away any of the substantive rights or benefits afforded under existing domestic partnership legislation, the argument simply needs to be amended to provide that Proposition 8 doesn't take away any rights or benefits from gay or lesbian domestic "partnerships" (rather than "partners"). Thus, the Court shall issue a writ compelling Respondent to amend the argument in the manner set forth in attached Exhibit "A."

Petitioners next challenge the proponents' argument that the California Supreme Court "ignored the will of the people." The Court finds this statement to be typical partisan argument – i.e., subjective reaction to the Supreme Court's holding – and not an objectively and verifiably false statement of fact. Accordingly, this challenge is rejected.

Petitioners also challenge the proponents' argument that teachers "will be required" to teach young children about gay marriage. The Court agrees with Petitioners that this statement is false and misleading, and should be amended.

As Petitioners have established, current state law does not *require* school districts to teach anything about marriage or same-sex marriage at any grade level. Moreover, for those school districts that *choose* to include instruction about marriage as part of a health education curriculum, Education Code § 51240 requires that they allow parents to excuse their children from any such instruction conflicting with the parents' religious or moral convictions. (Cal. Ed. Code § 51240.)

Nevertheless, the ballot arguments can be rewritten as an accurate statement of the law and therefore do not need to be deleted. The argument can be made not false or misleading by amending the language to provide that state law "may" require teachers to instruct young children about marriage, and that teachers "could" be required to teach young children there is no difference between gay marriage and traditional marriage. Accordingly, the Court shall issue a writ compelling Respondent to make the amendments set forth in attached Exhibit "A."

In respect to the argument that marriage has been "redefined," the Court concludes that the proponents' argument is not objectively false or misleading. Although the California Supreme Court was explicit that its decision in the *Marriage Cases* "does not diminish any other person's constitutional rights," the Court acknowledged that the statutory provisions at issue in that case embodied an integral aspect of the definition of marriage. (*Marriage Cases, supra*, at pp.825, 851.) Moreover, the Court's decision

explicitly changed the *statutory* definition of marriage. Before the Court's decision, marriage was statutorily defined as "a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." (Former Cal. Fam. Code § 300.) In the *Marriage Cases*, the Court held that the language of section 300 limiting the designation of marriage to a union "between a man and a woman" is unconstitutional and must be stricken from the statute. The Court also held that the remaining statutory language must be understood as extending the designation of marriage to same-sex couples. (*Id.* at pp.856-857.) Thus, it is not false or misleading for the proponents to state that, as a result of the lawsuit, marriage was "redefined."

The suggestion that marriage has been redefined by "gay activists" and "activist judges" is a matter of opinion and/or typical partisan hyperbole, and not grounds for issuance of a writ.

Finally, the statement that marriages between same-sex couples will be invalid "regardless of when or where performed" also is not conclusively and objectively false or misleading. Even if this Court is inclined to agree that the "better view" is that the initiative, if passed, will not be given retroactive effect, it is not the role of this Court to decide that issue in the context of an emergency election writ heard on shortened notice. As a general rule, it is improper for courts to adjudicate pre-election challenges to a measure's substantive validity. (*Costa v. Superior Court* (2006) 37 Cal.4th 986, 1005-1006.) Because the question of retroactivity is unclear and subject to dispute, the statement is not "conclusively and objectively" untrue. In any event, the Court is not persuaded that the language poses any realistic danger of interfering with the ability of the voters to make an informed choice whether to vote for, or against, the measure.

For the foregoing reasons, the petition is GRANTED in part and DENIED in part. A writ shall issue directing Respondent Secretary of State Debra Bowen to amend the ballot arguments in the manner set forth in attached Exhibit "A." The writ shall further direct Respondent to forward the amended ballot materials, and their translations, to the extent possible, for Proposition 8 to Real Party in Interest Geoff Brandt and county elections officials, for inclusion on the November 4, 2008, General Election Ballot Pamphlet and ballot; notwithstanding the twenty day review period provided for in Elections Code sections 9092 and 9054, subdivision (c), and the consultation requirements provided for in Elections Code section 9054, subdivision (b).

This minute order shall be effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice shall be required.

EXHIBIT "A"

AMENDMENTS TO ARGUMENT IN FAVOR OF PROPOSITION 8

The following portions of the Argument in Favor of Proposition 8 shall be amended as follows:

"Proposition 8 is about preserving marriage; *it's not an attack on the gay lifestyle*. Proposition 8 doesn't take away any rights or benefits ~~from~~ of gay or lesbian domestic ~~partners~~ **partnerships**. Under California law, "domestic partners shall have the same rights, protections and benefits" as married spouses. (Family Code §297.5) There are NO exceptions. Proposition 8 WILL NOT change this."

"The narrow decision of the California Supreme Court isn't just about 'live and let live.' ~~In health education classes,~~ State law **may** requires teachers to instruct children as young as kindergarteners about marriage. (Education Code §51890.) If the gay marriage ruling is not overturned, **TEACHERS WILL COULD BE REQUIRED** to teach young children there is *no difference* between gay marriage and traditional marriage."

"We should not accept a court decision that **may** results in public schools teaching our kids that gay marriage is okay. That is an issue for parents to discuss with their children according to their own values and beliefs. *It shouldn't be forced on us against our will.*"

"Some will try to tell you that Proposition 8 takes away legal rights of gay domestic ~~partners~~ **partnerships**. That is false. Proposition 8 DOES NOT take away any of those rights and does not interfere with gays living the lifestyle they choose."

AMENDMENTS TO REBUTTAL TO ARGUMENT AGAINST PROPOSITION 8

The following portions of the Rebuttal to Argument Against Proposition 8 shall be amended as follows:

"Proposition 8 is about traditional marriage; it is not an attack on gay relationships. Under California law gay and lesbian domestic ~~partners~~ **partnerships** are treated equally; they already have the same rights as married couples. Proposition 8 does not change that."